DIVISION ONE
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IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

THE HARTFORD*, Petitioner Carrier, v. THE INDUSTRIAL COMMISSION OF ARIZONA, Respondent, OUTWEST SERVICES, L.L.C.**, Respondent Employer, SCF OF ARIZONA**, Respondent Carrier, OMEGA SERVICES, L.L.C.*, Respondent Employer, VICTOR LEIJA, Deceased, Respondent Employee.	No. 1 CA-IC 09-0045 DEPARTMENT A **MEMORANDUM DECISION** (Not for Publication - Rule 28, Arizona Rules of Civil Appellate Procedure)

Industrial Commission

ICA Claim Nos. 20080-240449*
20081-780347**

Carrier Claim Nos. YKX35341C*
080733**

Administrative Law Judge J. Victor Stoffa

AWARD AFFIRMED

Jones Skelton & Hochuli, P.L.C. By Charles G. Rehling, II Lori L. Voepel Nicholas D. Acedo Attorneys for Petitioner Carrier	Phoenix
State Compensation Fund By James B. Stabler, Chief Counsel Sharon M. Hensley Mark A. Kendall Attorney for Respondents Employer/Carrier	Phoenix

D O W N I E, Judge

¶1 Petitioner The Hartford seeks special action review of an award for compensable death benefits. For the following reasons, we affirm.

FACTS & PROCEDURAL HISTORY

¶2 On January 18, 2008, Victor Leija suffered a fatal fall while washing exterior windows at a Bank of America branch in Glendale. Omega Services, L.L.C. ("Omega") and The Hartford, its workers' compensation carrier, concede that Leija was working for Omega at the time. The Hartford contends, however, that a joint venture existed between Omega and Outwest Services, L.L.C. ("Outwest"), such that Outwest's carrier, SCF of Arizona ("SCF"), should "split the widow and dependent benefit claim payments with Hartford."

¶3 Del Turner and Craig Hoyer are the respective owners of Omega and Outwest. The two men previously worked together at

Service First Window Cleaning. They decided to leave Service First to start their own window-washing business. Although they considered forming a partnership, Turner had a non-compete clause, so they decided to form separate limited liability companies instead, with an understanding they would "help each other out" by trading services or paying a "just wage." Omega and Outwest obtained separate workers' compensation and liability insurance policies,[1] and they independently solicited jobs and entered into service contracts. However, the businesses shared a common pool of employees and equipment, communicated daily to determine where employees would work, and worked together on certain jobs that required the pooling of resources.

¶4 Omega and Outwest both employed Leija. They guaranteed him $800 a week "to work between the companies." Leija received $160 per day from whichever business he worked for that particular day. Sometimes, Leija worked half a day for one company and the remaining half for the other. Outwest provided Leija with a truck for business and personal use. It had a magnetic sign on the side reading "Outwest." Leija drove this truck to the Bank of America job on January 18, 2008.

[1] The Hartford was originally Outwest's carrier, but Outwest switched to SCF because The Hartford would not cover work on buildings taller than three stories. The Bank of America property at issue here did not exceed three stories.

¶5 After Leija's death, Hoyer paid Leija's family $1600, which included the amount Omega owed Leija for January 18. Although Hoyer and Turner would typically reconcile their financial obligations to each other on a monthly basis, neither could specifically recall when and how Omega might have reimbursed Hoyer for paying Leija's January 18 wages.

¶6 At the evidentiary hearing before an administrative law judge (ALJ), all parties agreed that Omega employed Leija on the date of his death. Turner and Hoyer testified, and the ALJ received documentary evidence.

¶7 On April 10, 2009, the ALJ issued a Decision Upon Hearing and Findings and Award Re: Employer Status and Liability ("April 10 Decision"). The ALJ concluded that, at the time of his death, Leija "was an employee of Omega insured by Hartford and he was not then an employee of Outwest." The Hartford requested review of the April 10 Decision. The ALJ issued a Decision Upon Review Affirming and Modifying Findings and Award Re: Employer Status and Liability ("May 28 Decision"). Although the May 28 Decision reaffirmed that SCF was not responsible for sharing the benefit payments, the ALJ made several modifications to the April 10 Decision, which we discuss *infra.*

¶8 We have jurisdiction over The Hartford's timely petition for special action pursuant to Arizona Revised Statutes

("A.R.S.") sections 12-120.21(A)(2) (2003), 23-951(A) (1995), and Arizona Rule of Procedure for Special Actions 10.

DISCUSSION

¶9 The Hartford raises one claim on appeal: that the ALJ was required to award death benefits against both Omega and Outwest after finding that the evidence demonstrated these employers functioned as a joint venture.[2] The ALJ's actual ruling, though, is in dispute. According to The Hartford, he "found that Omega and Outwest functioned as a joint venture and that Leija's work on the B of A job was on behalf of that joint venture." SCF, on the other hand, contends that, "[w]hile the ALJ found that Omega and Outwest displayed general characteristics associated with a joint venture arrangement, he ultimately concluded that these entities did not meet all of the necessary elements of a joint venture."

¶10 To place the ALJ's rulings in context, we first discuss the law regarding joint ventures. A joint venture is "a special relationship between two or more parties to engage in and carry out a single business venture for joint profit without any actual partnership or corporation designation." *Helfenbein v. Barae Inv. Co., Inc.,* 19 Ariz. App. 436, 439, 508 P.2d 101,

[2] In its opening brief, The Hartford does not rely on a joint employee theory of liability, but focuses solely on the existence of a joint venture. We thus confine our review to that issue.

104 (1973) (citations omitted). The elements of a joint venture are: (1) an agreement; (2) a common purpose; (3) a community of interest; (4) an equal right of control; and (5) participation in profits and losses.[3] *Estate of Hernandez v. Flavio,* 187 Ariz. 506, 509, 930 P.2d 1309, 1312 (1997); *Tanner Cos. v. Superior Court (Scott),* 144 Ariz. 141, 143, 696 P.2d 693, 695 (1985) (citation omitted).

¶11 The April 10 Decision addresses each of the joint venture factors, stating:

> 28. . . . [W]hile perhaps not intending to invariably function as a partnership or joint venture and while perhaps not as commercially intertwined as Proctor and Gamble, Turner and Hoyer appeared to be functioning as a joint venture for purposes of their respective window washing businesses.
>
> 29. While there was no overt exertion of control by Hoyer over Leija on the B of A job, it's difficult to imagine, given the parties' relationship, that Leija would have felt free to ignore Hoyer if he had shown up at a Turner job with need for some temporary assistance. Hoyer's contribution to the

[3] Both parties cite *West v. Soto,* 85 Ariz. 255, 336 P.2d 153 (1959), which omits the fifth element: participation in profits and losses. Since *West* was decided in 1959, the Arizona Supreme Court has clearly stated that five factors are necessary to establish a joint venture. *See also Ellingson v. Sloan,* 22 Ariz. App. 383, 386 527 P.2d 1100, 1103 (1975) ("There are five specific elements which must be present in order to establish a joint venture: (1) a contract, (2) a common purpose, (3) a community of interest, (4) an equal right of control and (5) participation in both profits and losses.") (citations omitted).

> design of the donkey[4] also provided some evidence of control.
>
> 31. . . . Here, both Hoyer and Turner shared profits and communicated on a daily basis analyzing their manpower needs and preparing schedules accordingly.
>
> 32. . . . Certainly there was a sufficiently contractual relationship here to satisfy the requirements of a joint venture. There similarly appears to be a common purpose and a community of interest is [sic] obtaining and performing profitable window washing work.

¶12 These findings seem to portend a determination that Omega and Outwest acted as joint venturers. However, the April 10 Decision goes on to state:

> 36. Based on the facts of Leija's claim, were there otherwise any potential compromise of the survivor's rights, the inclination of the undersigned would be to find the claim compensable against both Omega/Hartford and Outwest/SCF with benefits apportioned based on the amount each paid to Leija.
>
> 37. While that result might appear equitable and reasonable, there is one item which appears irresolvable and that is the desire of these companies to avoid the fact or the appearance of a joint venture or partnership so that they might continue performing and profiting by work which Hartford's insurance policy restriction to three story work would otherwise prohibit. This represents a

[4] The record describes a "donkey" as "an apparatus that goes on the roof that has a counter weight and allows a person to operate a boson's chair to clean windows on the outside of the building." Omega used Outwest's donkey for the Bank of America job, and Outwest used Omega's pressure washer as "trade-off" for its jobs.

> reasonable basis underlying their selection of separate entities for the performance of the work.
>
> 38. Further, if the deceased here were to be found an employee of both Omega and Outwest at the time of his demise, that might well require a similar finding imposing liability on Hartford or placing Omega's coverage in jeopardy were a death to result from a fall greater than three stories on an Outwest job otherwise insured by SCF. The undersigned suspects in that circumstance that SCF's position here would start to appear quite compelling to Hartford.

The April 10 Decision concluded that, at the time of his death, Leija "was an employee of Omega insured by Hartford and he was not then an employee of Outwest."

¶13 The May 28 Decision made substantial changes to the April 10 Decision and retreated rather significantly from some of the earlier findings about a joint venture. It stated, in pertinent part:[5]

> 29. While there was no overt exertion of control by Hoyer over Leija on the B of A job, it's difficult to imagine, given the parties' relationship, that Leija would have felt free to ignore Hoyer if he had shown up at a Turner job with need for some temporary assistance. Hoyer's contribution to the design of the donkey also provided some evidence of control. Nonetheless, there was no direct evidence demonstrating that Outwest had exercised, and therefore would have had any right of control over Leija's

[5] Underlining denotes language that the May 28 Decision added to the April 10 Decision. ~~Strikeouts~~ indicate language omitted from the later decision.

> activity on the Bank of America at any time [sic]
>
> 31. . . . Here, both Hoyer and Turner ~~shared profits and~~ communicated on a daily basis analyzing their manpower needs and preparing schedules accordingly and each of them benefitted by the profitability of the other.
>
> 32. . . . Certainly there was a sufficiently contractual relationship here to satisfy the requirements of a joint venture if the intent of the parties were consistent with performing as a joint venture. There similarly appears to be a common purpose and a community of interest ~~is~~ in obtaining and performing profitable window washing work generally. SCF cited *Garcia v. City of South Tucson*, 131 Ariz. 315, 318, 640 P.2d 1117, 1120 (App. 1982). However, the agreement between the municipalities in the Garcia case specifically provided in writing that the immediate employer had "exclusive control" over the injured employee—a provision which, if present and applicable to Omega here, would have made reaching the current result easier.

¶14 If the April 10 Decision were the final award, we would have some difficulty reconciling the ALJ's findings with his ultimate conclusion. That decision found all necessary elements of a joint venture, but nevertheless concluded SCF was not responsible for sharing benefit payments. "For purposes of workers' compensation, each individual joint venturer is the employer of all employees doing work on behalf of the joint venture." *Conner v. El Paso Natural Gas Co.,* 123 Ariz. 291, 293, 599 P.2d 247, 248 (App. 1979) (citations omitted). Thus,

if a joint venture truly existed, SCF would be required to contribute to the benefit payments.

¶15 It is, however, the May 28 Decision that is the final award subject to our review. We will affirm that decision if it is correct for any reason, even if we disagree with the stated basis for it. *See Salt River Project v. Indust. Comm'n,* 126 Ariz. 196, 200, 613 P.2d 860, 864 (App. 1980) (holding that hearing officers, like superior court judges, should be affirmed if they reach the correct legal result, even if they reach it for the wrong reason). We review the ALJ's legal conclusions about a joint venture *de novo. Vance Int'l v. Indus. Comm'n,* 191 Ariz. 98, 100, ¶ 6, 952 P.2d 336, 338 (App. 1998); *Faragher v. Indust. Comm'n*, 184 Ariz. 528, 531, 911 P.2d 534, 537 (App. 1995).

¶16 Because a joint venture requires proof of five factors, the absence of any one element is fatal. The record here does not establish that Omega and Outwest shared profits and losses generally, or that they did so specifically as to the Bank of America job.[6] *See Ellingson,* 22 Ariz. App. at 386, 527 P.2d at 1103 ("A joint venture is formed when two or more parties agree to pursue a particular enterprise in the hope of

[6] The record also supports the May 28 findings about the lack of evidence regarding "intent of the parties" and the "right of control." Because the dearth of evidence about sharing profits and losses is even more clear-cut, we need not expound on these other missing elements of a joint venture.

sharing a profit.”). Thus, the ALJ correctly concluded that SCF was not responsible for benefit payments, though not necessarily for the reasons stated.

¶17 Omega and Outwest clearly did not operate as joint venturers at all times. They did so on twenty to thirty large jobs that required them to pool employees and resources. On those occasions, the companies would split income from the job. However, the businesses solicited and entered into their own contracts and operated independently on many jobs. Outwest sometimes hired other companies to work with it on high-rise buildings. Even when Omega and Outwest worked together, unless they agreed to act as joint venturers, one principal would hire the other at a rate of $50 per hour.

¶18 We next consider whether the record could support a finding that Omega and Outwest had a joint venture as to the Bank of America job. The contract for that job was between LandCorp, a building maintenance company, and Omega. Pursuant to the contract, Omega cleaned the bank’s windows every six weeks.

¶19 Although Omega and Outwest admittedly joint-ventured the first time they cleaned the bank in 2006, the evidence reflects that they did do so only because the building was extremely dirty, requiring them to rent additional equipment at significant expense. Hoyer worked with Omega at the bank on two

or three subsequent occasions, but each time, he was paid an hourly wage. No evidence established that Hoyer or Outwest received a share of profits from the Bank of America job after the initial cleaning or that the two businesses somehow shared losses after that point. The ALJ's determination that each business "benefitted by the profitability of the other" is not synonymous with sharing profits and losses. *Cf. Modular Sys., Inc. v. Naisbitt,* 114 Ariz. 582, 586, 562 P.2d 1080, 1084 (App. 1977) (holding that the acquisition by two persons of equal shares in a corporation did not give rise to an agreement to share equally in the losses and profits of the corporation, which is an essential element of a joint venture).

¶20 Because no reasonable interpretation of the record establishes that Outwest and Omega shared in profits and losses generally, or that they did so specifically as to the Bank of

America job, no joint venture was established as a matter of law.

CONCLUSION

¶21 For the foregoing reasons, we affirm the final award.

/s/
MARGARET H. DOWNIE, Judge

CONCURRING:

/s/
MAURICE PORTLEY, Presiding Judge

/s/
LAWRENCE F. WINTHROP, Judge